IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No. 2 of 2001

For Approval and Signature:

HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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YASHDEEP BUILDERS ENGINEERS & CONTRACTORS
Versus
STATE OF GUJARAT THRO' SECRETARY TO GOVT. OF GUJARAT AND ANOTHER

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Appearance :
MR HK PARMAR for the Petitioner
MR UR BHATT, ASSISTANT GOVERNMENT PLEADER for the Respondents

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CORAM : HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

Date : 08/12/2005

ORAL JUDGMENT

1. This revision application is filed by Yashdeep Builders, Engineers and Contractors being aggrieved and dissatisfied with the judgment and order dated 18.04.2000 passed by the Gujarat Public Works Contracts Disputes Arbitration Tribunal, Ahmedabad (hereinafter referred to

as, ***'the tribunal'***, for short), whereby the tribunal was pleased to dismiss Civil Application No.92 of 1999 in Arbitration Reference No.28 of 1999 and thereby, dismissed the Arbitration Reference on the ground that the petitioner has failed to establish sufficient cause for condonation of delay, caused in filing the reference.

The tribunal was pleased to hold that the application is devoid of merits and is required to be dismissed. It was also held that the application is liable to be dismissed with costs.

2. Following are the facts mentioned in paragraph NO.2 of the memo of the Civil Revision Application which are necessary for appreciating the controversy involved in the matter.

The petitioner entered into the work contract for construction of work of S.R. to Himatnagar – Ranasan Dhansura Road KM 19/0 to 3415 providing spar on Meshwa Bridge upstream side. **The work order was issued on 29.02.1996**. The stipulated period for completion of the work was 6 months. **The work was completed on 19.08.1996**. The final bill was paid by the respondents to the petitioner, as per the say of the petitioner in the month

of December 1996, while as per the say of the respondents it was paid on 07.11.1996. It is the case pleaded by the petitioner that **the amount of Security Deposit was released by the respondents on 21.03.1998**. It is only after that the petitioner served a Claim Notice to the respondents through an advocate on 05.10.1998 for settlement of disputes. As per the say of the petitioner, the respondents did not give any reply to the said Claim Notice. The petitioner then filed the Reference on 26.03.1999. Later on, Civil Application (Civil Application No.92 of 1999 under Section 17 of the Act in Arbitration Reference No.28 of 1999 under Section 8 of the Act) was filed on 16.07.1999 praying for condonation of delay, if any, caused in filing the Arbitration Reference.

The respondents filed a reply contending that the petitioner has accepted the payment of the final bill (be it either in December, 1996 or November, 1996) **without any protest** and also the payment of Security Deposit without any protest; that the remaining 2.5% of the Security Deposit was also released in the form of National Savings Certificate in March, 1998, the reference is clearly time barred and the same must fail on that ground.

3. Mr.H.K.Parmar, the learned advocate for the petitioner vehemently contended that a reference under Section 8 of the Act is to be filed within a period of one year from the date of denial of settlement of the disputes. He submitted that as the Claim Notice was served on 05.10.1998, the reference was required to be filed within one year from non-settlement of the disputes raised in the Claim Notice on or before 07.10.1999. He submitted that the reference was filed on 26.03.1999 and, therefore, there was no question of it being time barred and, therefore, it is not time barred. He submitted that still a Civil Application was filed praying that delay, if any, be condoned.

4. The learned advocate for the petitioner submitted that it is true that final bill was paid in December, 1996, it is also not disputed that the same was accepted without any protest. But then he submitted that **raising of any protest at the time of accepting the payment of the final bill always jeopardies the right of the party to get the security deposit back and, therefore, even if payment of final bill is accepted by the party without any protest, the period of limitation will start running only after there is a denial of settlement of disputes.**

He submitted that it was only by notice dated 05.10.1998 that the party raised the disputes and as the same are not settled, the petitioner filed the reference on 26.03.1999. incidentally, that is only after receiving the Security Deposit on 21.03.1998.

5. Section 8 of the Act provides for **Reference to Tribunal and making of award**. Sub-section 1 of Section 8 of the Act reads as under:

> "(1) Where any dispute arises between the parties to the works contract, either party shall, irrespective of whether such works contract contains an arbitration clause or not, refer, **within one year from the date when the dispute has arisen. Such dispute in writing to the Tribunal for arbitration in such forms and accompanies by such documents or other evidence and by such fees as may be prescribed**."

The words used in Sub-section 1 of Section 8 are, **'within one year from the date when the dispute has arisen'.** The learned advocate for the petitioner has changed these words to, **'within one year from the date of denial of settlement of disputes'.** The learned advocate submitted that in the present case, the tribunal has committed a grave error in not accepting the case of the

petitioner, which was filed within one year from the date of the notice, i.e. 05.10.1998 which was given asking the respondents to settle the dispute and not holding that the reference was filed within time. He submitted that according to him, there is nothing much to probe in this matter. It is a simple matter inasmuch as the Security Deposit was released only on 21.03.1999, thereafter, well within time, a Claim Notice was served and will within time from the date of the notice, the reference was filed. Therefore, there is no question of the reference being beyond period of limitation. He submitted that the tribunal has committed a grave error in dismissing the Civil Application and consequently, dismissing the reference, that too with costs of Rs.500/-

6. The learned advocate relied upon the decision of the Division Bench of this Court **(Coram: H.R.Shelat and H.H.Mehta, JJ) in First Appeal No.62 of 1981 dated 14.03.2000, judgment per H.R.Shelat, J.**

Mr.Parmar, the learned advocate submitted that as is held by the Division Bench of this Court that, when payment of Security Deposit is made subsequent to the final bill, it is required to be decided whether it is **'payment of the Security Deposit'** or **'payment for the work done'.** He submitted that as per the decision of this

Court, it will be the **'decisive factor.'** The learned advocate submitted that the Division Bench had relied upon a decision of this Court in **Civil Revision Application No.1201 of 1971.** According to him, it was held by this Court in the said judgment that, “if the amounts are held back while making the payment of the running bill and retained by the Government as security deposit, it will not be a case of 'payment of security deposit', like the security deposit paid by the contractor at the commencement of the contract. The amount held back while making the payment of the current bill **must be treated to be the sums payable to the contractor 'for the work done'.”**

The learned advocate submitted that the release of the amount of the Security Deposit by the respondents should be treated as a 'payment for the work done' and by doing so, this Court should hold 'the final payment was made only on 21.03.1998.' He submitted that the petitioner had lodged his claim by notice dated 05.10.1998 and as the respondents did not settle the disputes, it amounted to 'denial of settlement of disputes'. That being so, the reference lodged on 26.03.1999, was well within time.

7. The submission of Mr.Parmar is throughly misconceived. The submission is made without appreciating the glaring differences in the facts of the case on hand and that of the case before the Division Bench, which in turn relied upon the observations of this Court in Civil Revision Application No.1201 of 1971 and decision in First Appeal No.72 of 1979.

The facts before the Division Bench are mentioned in paragraph Nos.5 and 6 of the judgment. The same are reproduced for the ready perusal:

> "5. It is the contention of the appellant that the final bill came to be passed and payment was made on 14th May, 1973. In such cases, Article 113 of the Indian Limitation Act would be applicable which provides the period of 3 years to file such suit and the period of 3 years begins to run from the day when right to sue accrues. In such cases, the right to sue accrues from the **day the final bill is passed and payment is made**. The period of limitation in this case therefore began to run from 14th May 1973. The respondent therefore ought to have filed the suit latest by 14th May 1976, but when the suit in this case is filed on 7th August 1976 it would appear that the suit was filed late by around 3 months. The learned Judge therefore ought to have dismissed the suit holding that it was barred by the period of limitation.

6. In reply to such contention, Mr.Sukhwani, the learned advocate representing the respondent submits that the period of limitation ordinarily would begin to run from the day when the final bill is passed and the payment thereof is made, but in the case on hand the last payment cannot be said to have been made on 14th May 1973 when the final bill was passed. In the case on hand, Rs.19,702/- were **held back** in piecemeal by the appellant while making the payment of the running bills tendered by the respondent, and the payment of the said sum was made back on 19th February 1974 when the security deposit amount of Rs.19,702/- was **also** paid. The period of limitation therefore in this case began to run not from 14th May 1973 but from 19th February 1974 when last payment of Rs.19,702/- was made. The respondent had therefore to file the suit latest by 19th February 1977; Instead that he filed the suit on 7th August 1976 which was earlier by around 6 months. The learned Judge was, therefore, right in holding that the suit was within time."

8. In the case on hand, it is nobody's case that any amount was '**held back'** from the running bills. It is also not the case of the petitioners that even on 21.03.1998 when Security Deposit was released, any amount was **'held back'.** Had it been so then what Mr.Parmar submits would have been right and the decision of the Division Bench would have squarely applied and this revision would have

succeeded. Unfortunately, the facts of the case are otherwise. On 21.03.1998, the department released the Security Deposit only. It did not pay any other amount, as nothing was **'held back'.** That being so, the period of limitation began to run from the date of payment of the final bill, which was accepted in December, 1996. The period of limitation is 'one year' hence, the reference ought to have been filed before December, 1997, which is filed in March, 1999 only. Therefore, it is clearly time barred and the tribunal has rightly so held.

9. Mr.Parmar emphasized his submissions to an extent, disproportionate to a reasonable emphasis warranted in any case. He repeatedly read paragraph No.7 of the judgment of the Division Bench, but to no avail. Any amount if **'held back'**, it certainly constitutes 'the payment of final bill', but if the amount is that of 'Security Deposit' only and if that is released, there is no question of the payment being made of the final bill.

The learned advocate cannot be heard to say and argue that a party is justified in raising a claim only after the release of the Security Deposit because if the claim is raised before release of Security Deposit, the experience of the party is that release of Security

Deposit gets delayed and the right of the party is jeopardized. This may be an exception not a rule. Even if that is so, it is to be treated as profession hazard of doing business with the Government. A party cannot be heard to say that he was waiting for the release of the Security Deposit and only after the Security Deposit was released, he raised the claim by serving a notice. Acceptance of this submission will amount to rewriting the provision of Law of limitation. The provision as it exists, a reference is to be filed within one year from the date on which the dispute has arisen. IF the legislature intended to provide for the situation as contended by the learned advocate for the petitioner, the provision would have been, 'within one year from the date of release of the security deposit'. That being not the case, this submission of learned advocate cannot be accepted and the same is rejected.

10. The learned advocate relied upon a decision of this Court in the matter of **KAUSHIK CONSTRUCTION COMPANY VS. STATE OF GUJARAT**, reported in 2001 (3) GCD 91, (UJ). However, the learned advocate could not point out as to how the said decision is applicable to the facts of the present case. The facts in the case of Kaushik Construction Company (Supra) are totally different then

the facts of the case on hand and, therefore, the said decision has no application.

11. The learned advocate next relied upon a decision of this Court in the case of **B.PATEL & CO. VS. STATE OF GUJARAT & ANOTHER**, reported in 1998 (3) GLR 1913. He invited the attention of the Court to certain observations made by this Court in paragraph No.4, which reads as under:

> “.....
> (1) There must be an assertion of claim by one party and refusal in respect of the same by the other party. Though no limitation is provided for first assertion, it should not be later than the limitation available as per the law prevalent on the date of payment of final bill.
>
> (2) On completion o the work, the right to get payment would normally arise but just because the final bill is prepared and payment is made, the cause of action will not arise.
>
> (3) The party cannot postpone the real cause of action by asking or writing reminders, or waiting for the reply for unreasonable period, which should normally be not beyond six months from the date of fist assertion.”

The learned advocate could not point out as to how this decision helps the petitioner in the present case. As discussed hereinabove, the contention of the learned advocate that, 'first assertion was made on 05.10.1998 and as there was no reply to the notice, the reference was filed within one year.'

This submission is already rejected by this Court, repetition and reiteration of the same is of no consequence. As discussed hereinabove, the period of Limitation cannot be extended by giving a claim notice at a late state. In the case on hand, the final bill was paid and the same was accepted by the petitioner without any protest, in December, 1996 (as per the say of the petitioner itself) and within one year from that date, the petitioner did not raise any claim and waited till release of the Security Deposit on 21.03.1998 and then served the Claim Notice on 05.10.1998. Deliberate late assertion of right and filing of the reference within one year from the date of such assertion cannot bring reference within the period of limitation.

In the matter of B.Patel & Co. (Supra) in paragraph No.4 it is noted that the Supreme Court has held in the case of State of Orissa Vs. Damodar Das, reported in 1996

(2) SCC 216 that, “there is no right to apply until there is clear and unequivocal denial of that 'right' by the respondent. However, **it must be raised as soon as the cause of arbitration arises**. The Court further said that delay defeats justice and equity aids promptitude and reluctant consequences. Defaulting party should bear the hardship and should not transmit the hardship to other party.....”

In the present case,the petitioner did not raise its claim 'as soon as' cause of arbitration arose. A cause of arbitration arose on payment of the final bill which as per the say of the petitioner was made in December 1996 and therefore, if at all the petitioner wanted to raise any claim, he should have raised the same immediately. As submitted by the learned advocate for the petitioner, the petitioner was waiting for release of the Security Deposit so that the same does not get jeopardies on account of raising a claim against the Government. If that is so, the party must take consequence of such waiting. A party cannot have a cake and eat it too. It is for the party to decide to raise a dispute well within time or allow it to get time barred by waiting to get release of the Security Deposit.

12. The learned advocate for the petitioner next relied upon a decision of the Hon'ble the Apex Court in the matter of **MAJOR (RETD.) INDER SINGH REKHI VS. DELHI DEVELOPMENT AUTHORITY**, reported in AIR 1988 SC 1007. He submitted that the Hon'ble the Apex Court has held in this judgment that period of limitation is to be computed from the date the claim is asserted and payment is denied. Making such submission without any reference to context is of no avail. In the case before the Hon'ble the Apex Court, though there was an assertion of claim by the appellant, but then there was a silence and later on refusal of that claim by respondent. In that case, on completion of the work, a right to get payment had arisen, but final bills were not prepared. Despite assertion of claim, there was non-payment and therefore, the cause of action had arisen from that date. The facts being totally different, the decision has no application to the case on hand.

13. The learned advocate for the petitioner also relied upon a decision of the Hon'ble the Apex Court in the matter of **BHARAT COKING COAL LTD. VS. M/S ANNAPURNA CONSTRUCTION**, reported in 2003 (3) R.A.J. (Recent Arbitration Judgments) 44 (SC).

The learned advocate relied upon this decision to reply to the contention raised on behalf of the Government that the petitioner had accepted the payment of the final bill without any protest. He relied upon the observations of the Hon'ble the Apex Court in paragraph No.9 of the judgment which reads as under:

> “9. Only because the respondent has accepted the final bill, the same would not mean that it was not entitled to raise any claim. It is not the case o the appellant that while accepting the final bill, the respondent had unequivocally stated that he would not raise any further claim. In absence of such a declaration, the respondent cannot be held to be estopped or precluded from raising any claim. We, therefore, do not find any merit in the said submission of Mr.Sinha.”

The reliance is misplaced inasmuch as it is not the say of the Government that the petitioner cannot raise a claim. What is submitted is that the payment of the final bill having been accepted without any protest, the claim can be said to have been raised by notice dated 05.10.1998. That being so, it is beyond the period of one year. The petitioner if at all had any grievance, he ought to have filed a reference within one year. If the petitioner had raised any protest at the time of

accepting the final bill, it could have been argued that he raised a claim and that was not decided and therefore, the period of limitation will start only from the day his claim/protest came to be decided by the authorities.

14. The learned advocate for the petitioner next relied upon a decision of Division Bench of this Court (Coram: N.B.Patel & K.G.Shah, JJ) in First Appeal No.72 of 1979 dated 11.07.1990. He invited the attention of the Court to the following observations:

> "..... The payment of the final bill (ex.130) dated 30.06.71 (Rs.9347) was made on 30671. However, the question, in the circumstances of this case, is **whether the final adjustment or accounts between the parties and the final bill payment can be said to have been made on 30.6.71 or in October 1971 when the security deposit amount was returned to the plaintiff**."
>
> **(emphasis supplied at the request of Mr.Parmar)**

The learned advocate for the petitioner also invited the attention of the Court to the final conclusion recorded by the Division Bench:

> "..... We are in respectful agreement with the view

taken by P.D.Desai, J. in the aforesaid Civil Revision Application and accordingly, in the peculiar facts and circumstances of this case, we hold that the final adjustment and payment for the work done by the plaintiff was made to him in October 1971. We agree with the view of the learned Judge that merely because this amount was labeled as security deposit amount, it did not cease to be an amount payable to the plaintiff for the work done by him. Since that amount was paid to him in October 1971, the suit filed on 28.10.74 was within time, considering the fact that the plaintiff was entitled to claim credit for the statutory period of two months for the notice under Sec.80 Civil Procedure Code."

The judgment of the Division Bench was in the peculiar facts and circumstances of that case. As noted above, the Division Bench has taken the view that, **"when any amount is 'held back' from running bill even if it is titled as security deposit, it remains to be a payment of the work done and not the payment of security deposit."** The Division Bench, therefore, held that, when such 'held back' amount is paid, there is final adjustment of the accounts between the parties.

In the case on hand, the facts are different. It is not the case of the petitioner that any amount was **'held**

back' and that amount was paid on 21.03.1998. In fact, the case of the petitioner is that on 21.03.1998, remaining 2.5% of the security deposit was released. From the aforesaid discussion, it is clear that the facts before the Division Bench as well as the learned single Judge were different then the facts of the case on hand. In those cases, some amount was deducted from running bills and that amount was labeled as security deposit and therefore, the Court said that payment of that 'held back' amount cannot be said to be payment/release of security deposit. In fact, it is the final adjustment of accounts between the parties.

14. In view of the aforesaid discussion, this Court has no doubt that the judgment of the tribunal is in accordance with law and requires no interference at the hands of this Court. The revision application is accordingly dismissed and the same is dismissed with cost of Rs.5,000/- (Rupees Five Thousand Only), which the respondents will be entitled to deduct from the deposit of the petitioner, if any. Rule is discharged.

(RAVI R.TRIPATHI, J.)

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